

SEP 6 1990

JOSEPH F. SPANJOL, JR.
CLERK

No. 89-1834

(4)

In The
Supreme Court of the United States
October Term, 1989

D.T., a minor, by his legally appointed guardians, M.T. and K.T., as parents and legal guardians of D.T.; F.H. Jr., a minor, by his legally appointed guardians, F.H. and L.H., as parents and legal guardians of F.H., Jr.; P.M., a minor, by his legally appointed guardian, R.T., as parent and legal guardian of P.M.,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-6 of
Pawnee County, Oklahoma,

Respondents.

**RESPONSE IN OPPOSITION TO PETITIONERS'
MOTION FOR LEAVE OF THIS COURT TO AMEND
PETITION FOR WRIT OF CERTIORARI TO
INCLUDE SUPPLEMENTAL QUESTION ARGUED
IN PETITIONER'S REPLY BRIEF**

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COMES NOW the respondent, Independent School District No. I-6 of Pawnee County, Oklahoma, and in response to Petitioners' Motion for Leave of This Court to Amend Petition for Writ of Certiorari to include Supplemental Question argued in Petitioner's Reply Brief, would request this Court to deny Petitioners' motion.

Petitioners seek to amend their Petition for Writ of Certiorari to include the following question:

SHOULD THIS COURT DEFINE MINIMUM (WRITTEN) POLICY OF SCHOOL DISTRICTS IN FUNCTIONAL CUSTODY OF CHILDREN TO PREVENT DEFENSELESS VIOLATIONS OF THEIR CONSTITUTIONALLY PROTECTED LIBERTY INTEREST?

Petitioners seek to justify this amendment on the following grounds:

Quite simply, in trying to establish liability to compensate children for regrettable injuries, petitioners' counsel overlooked an alternative solution to the problems of preventing abuse in the public schools.

It is quite clear that petitioners are seeking to include in their Petition for Writ of Certiorari, an argument not previously advanced before this Court, or before the United States Court of Appeals for the Tenth Circuit. Petitioners request this Court to find that the Constitution of the United States mandates "a narrow duty diligently to investigate abuse." See Petitioners' Motion, p. 3; Petition for Writ of Certiorari, pp. 15-16. Apparently, petitioners are trying to amplify this allegation and convert it into an argument that the procedures of the school district are somehow constitutionally infirm. Not only is this a new argument not previously advanced to an

appellate court, petitioners specifically conceded to the Tenth Circuit Court of Appeals that an issue of this sort was not presented by this case:

In examining the policy of inaction of the District *it is conceded that the District's inadequate hiring practices and supervision procedures were not unconstitutional on their face.*

Brief of Appellee, p. 13 (filed by Petitioners in the appeal to the United States Court of Appeals for the Tenth Circuit) (emphasis added). By that statement, petitioners specifically granted that there was no constitutional infirmity in the "hiring practices and supervision procedures" of the respondent school district. Petitioners should not be permitted at this time to advance an argument or a theory they specifically rejected in their argument before the Tenth Circuit Court of Appeals.

Additionally, petitioners' argument would impermissibly result in liability because the school district, unknowingly, hired a tort feasor. See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 656, 691 (1978). Petitioners' "fault" argument is indistinguishable from one based upon policy or duty because fault would involve a breach of duty and the policy would have to implement the duty. Petitioners have conceded that there were no constitutional infirmities in the procedures of the school district regarding hiring and supervision of teachers. Therefore, there can be no breach of duty of a constitutional dimension in connection with those same procedures.

Furthermore, petitioners' Motion to Amend their Petition for Writ of Certiorari comes too late. Petitioners had almost four months from the date the opinion of the

Tenth Circuit Court of Appeals was filed until they filed their original Petition for Writ of Certiorari. Approximately an additional two months passed until respondent filed its Brief in Opposition. A month later, petitioners filed their reply, and as an after thought, included their additional Reason for Granting Writ. Their additional reason is not based upon any additional authority that was unavailable to them at the time they filed their original Petition for Writ of Certiorari. Additionally, as they admit in the previously quoted passage found on the second page of their motion, it simply did not occur to petitioners to advance this argument previously. Petitioners should not be permitted, now that briefing on the Petition for Writ of Certiorari is complete, to amend their Petition to assert an additional argument not previously asserted. At the very least, should petitioners be permitted to amend their Petition for Writ of Certiorari, the respondent school district should be given the opportunity to respond to that argument.

WHEREFORE, premises considered, respondent, Independent School District I-6 of Pawnee County, Oklahoma, prays to Court to deny Petitioners' Motion for Leave of this Court to Amend Petition for Writ of Certiorari to include Supplemental Question argued in Petitioners' Reply Brief, and furthermore, respondent prays

this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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